Supreme Court, U.S.
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No. 85-1154

IN THE

SUPREME COURT OF THE UNITED STATES

October Term

MARIE ELLSWORTH AND PAUL ELLSWORTH

Petitioners

vs.

CITY OF RACINE, A MUNICIPAL CORPORATION

Respondent

Petition for a Writ of Certiorari to
the United States Court of Appeals for
the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CITY OF RACINE
CITY ATTORNEY'S OFFICE
Joseph E. Boyle
Attorney for Respondent
730 Washington Avenue
Racine, Wisconsin 53403
(414) 636-9115

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SUMMARY OF ARGUMENT

1. The Court of Appeals correctly applied the principle that a person must show a "special relationship" to a municipality before that person can successfully assert a claim for a constitutional deprivation against the municipality.

2. The Court of Appeals did not rule that the Respondent was negligent, therefore, its finding that simple negligence does not give rise to a constitutional claim is irrelevant to this case.

ARGUMENT

The Respondent's request of the Supreme Court that the Petition for Writ of Certiorari be denied for the following reasons:

I.

THE COURT OF APPEALS CORRECTLY APPLIED THE PRINCIPLE THAT A PERSON MUST SHOW A "SPECIAL RELATIONSHIP" TO A MUNICIPALITY BEFORE THAT PERSON CAN SUCCESSFULLY ASSERT A CLAIM FOR A CONSTITUTIONAL DEPRIVATION AGAINST THE MUNICIPALITY.

Petitioner mistakenly asserts that the Court of Appeals ruled that the City did not have a constitutional duty to protect its undercover police officer and his family from a known risk of harm attributable to that officer's investigation. Nowhere in its decision did the Court of Appeals enunciate the foregoing statement as a legal principle.

What the Court of Appeals did do was to say that as a general principle, a municipality does not have a constitutional duty to protect citizens. (A Ap. A p. 4) It further

stated, however, that such a duty may be imposed if the circumstances of the particular case are such that give rise to a special relationship between the municipality and the person asserting the right to protection.

This case then turns on the definition of special relationships. The Court of Appeals used the following definition:

> Specifically, we have stated that when a municipality puts an individual in a position of danger from private persons and then fails to protect that individual, it cannot be heard to say that its role was merely a passive one. The municipality is as much an active tortfeasor in such a situation as if it had thrown the individual 'into a snake pit'.
> (A Ap. A p. 5)

Petitioners agree in their brief (p. 16) that the application of the "special relationship" test is generally acceptable. The admission, therefore, by Petitioners of the test's general acceptability by federal courts obviously undermines the credibility

of their argument that the decision of the Court of Appeals "conflicts with. . . other federal courts", and that its decision "espouses a dangerous principle. . ."

What Petitioners are really quarreling with is the way in which the Court of Appeals applied the "special relationships" test. In applying the test both the trial court and the Court of Appeals relied exclusively upon the allegations contained in Petitioners' complaint filed with the trial court and assumed all of the allegations contained therein were true.

In analyzing that complaint both the trial court and the Court of Appeals found as salient facts that Petitioner Marie Ellsworth had, in fact, been beaten by an unknown assailant and that this assailant was not in any way connected with the Respondent City of Racine (A Ap. A, p. 2). Those courts further found that the Respondent City of Racine did, in fact, supply a police officer to protect said

Marie Ellsworth for an eight hour period during each day that Mrs. Ellsworth's husband was working (A Ap. A, p. 2). (In argument before the Court of Appeals, it was brought out that the eight hour period was deemed adequate by the Racine Police Department, because Petitioner Paul Ellsworth, being a police officer, would be able to protect Mrs. Ellsworth during the remaining 16 hours of each day.) More importantly, both courts, relying on the complaint, found that on the day the beating took place said Marie Ellsworth voluntarily discharged the police officer and that after the police officer had left her company, Mrs. Ellsworth voluntarily ventured outside of her house in search of a dog (A Ap. A p. 2). She was attacked while searching for the dog.

Under the above factual findings, it would be impossible for the trial court or the appellate court or for any person of common sensibility to find that the

Respondent City of Racine had created a special relationship and then failed to protect the person whom it had placed in it.

From the above it is manifest that the above mentioned "conflict with other courts" and "dangerous principle" are figments of the Petitioners' imagination and wholly unsupported by precedent. The decisions of the trial court and the Court of Appeals in this matter were based on the facts at hand and their decisions finding no special relationship are amply warranted by the allegations of the complaint.

II.

THE COURT OF APPEALS DID NOT RULE THAT THE RESPONDENT WAS NEGLIGENT, THEREFORE, ITS FINDING THAT SIMPLE NEGLIGENCE DOES NOT GIVE RISE TO A CONSTITUTIONAL CLAIM IS IRRELEVANT TO THIS CASE.

The Petitioners again erroneously state that the Seventh Circuit "ruled" that simple negligence may not give rise to a cause of action under 42 USC § 1983. While the Court may have stated this in the dicta of its decision, it was never set forth as a ruling

which formed the basis of its decision in this case. The Court at no time found that the Respondent City of Racine was negligent in any manner with respect to its relationship to the Petitioners(A Ap. A p. 6 footnote 3). In the absence of such a finding a court's pronouncements on whether or not simple negligence gives rise to a constitutional violation are simply irrelevant. Because of this irrelevance, it is certainly not necessary for the Supreme Court to harmonize decisions of the various circuits in this respect. Such action would have no effect on the present case.

In addition, Respondents would like to comment on Petitioners' apparent misunderstanding of the Supreme Court decision of Parratt v. Taylor, 451 U.S. 527, 68 L. Ed 2d 420, 101 S. Ct. 1908 (1981). Petitioners seem to take the position that that case provides a carte blanche for the consideration by federal courts of all claims arising out of negligent conduct and

asserting deprivations under the Constitution of the United States. Such an interpretation is certainly at odds with the intent of the Parratt decision. In that decision (451 U.S. 544, 68 L. Ed 2d 434) the Court makes the following conclusory statement:

> Our decision today is fully consistent with our prior cases. To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.' Paul v. Davis, 424 US 693, 701, 47 L

> Ed 2d 405, 96 S Ct 1155 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

The Court is quite clearly saying that negligence does not normally give rise to assertions of constitutional violations. In cases where the state having jurisdiction over the civil action provides adequate post deprivation remedies to address such violations within its own legal framework there is no need for federal involvement. There is no allegation by Petitioners in the present case that the State of Wisconsin did not have adequate due process safeguards to adjudicate their claim had they chosen to avail themselves of them. In any event, the Supreme Court has, in effect, overruled Parratt, supra, in the cases of Daniels v. Williams, (No. 84-5872, decided January 21, 1986) and Davidson v. Cannon, (No. 84-6460, decided January 21, 1986).

CONCLUSION

The decision of the Court of Appeals

does not conflict with decisions of other circuits. Petitioners have cited no authority which would show that the Court of Appeals misapplied the "special relationship" test. Nor have they shown that its application was at variance with other circuits. Respondents believe that the application of this test is largely factual in nature. In order to find a conflict, therefore, it would be necessary to compare the same or very similar fact situations. Petitioners have not done this.

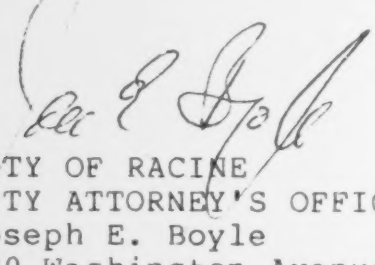
Petitioners' assertion that the Court of appeals ruled in this case that, "Negligence may not give rise to a cause of action under 42 USC Section 1983. . ." is erroneous. The court found, in fact, that Respondent was not negligent. Whether or not a civil rights action can be based on negligence is irrelevent here, and a holding by the Supreme Court either way will not affect the decision of the Court of Appeals.

Respondent respectfully requests that

the Court deny the Petition for a Writ of Certiorari.

Dated: January 29, 1986

Respectfully submitted,



CITY OF RACINE
CITY ATTORNEY'S OFFICE
Joseph E. Boyle
730 Washington Avenue
Racine, Wisconsin 53403
(414) 636-9115
Attorneys for Respondent